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86-1224

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1986

RUSSELL N. PION,
PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT,
RESPONDENT.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Court of Appeals for the Federal Circuit erred in ruling that the burden of production of evidence is properly allocated to former federal employees whose disability retirement benefits have been terminated pursuant to 5 U.S.C. 8347(d)?[1]

II. Whether the *Scroggins* doctrine, which prohibits judicial review of agency factual determinations, precludes a court from reversing an agency determination which lacks any support in the record?

[1] The parties below are reflected in the caption: Russell N. Pion and the Office of Personnel Management.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iii
Opinion Below	1
Jurisdiction	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. The Decision Below Denies Recipients of Federal Disability Retirement Benefits a Fair Hearing on Benefit Termination	5
II. The *Scroggins* Doctrine, Which Prohibits Judicial Review of Agency Factual Determinations, Does Not Preclude a Court From Reversing an Agency Determination Lacking Any Support in the Record	19
Conclusion	26
Appendix	A-1
Initial Decision of the Merit Systems Protection Board (Marsha Means Saylor, Presiding Official)	A-1
Final Decision of the Merit Systems Protection Board (Herbert E. Ellingwood, Chairman, Maria L. Johnson, Dennis Devaney)	A-6
Opinion of the United States Court of Appeals for the Federal Circuit (Rich, Smith and Nies, Circuit Judges)	A-8
Relevant Statutes and Regulations	A-10

Cases:

Page

Allen v. *United States*, 571 F.2d 14 (Ct. Cl. 1978) 22

Armstrong v. *Office of Personnel Management*, 7 MSPB 286 (1981) 16, 25

Bowman Transportation, Inc. v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438 (1974) 18

Brock v. *Weinberger*, 405 F.Supp. 1329 (W.D. Ark. 1975) 13

Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156, 83 S.Ct. 239 (1962) 6, 18

Chavez v. *Office of Personnel Management*, 6 MSPB 343 (1981) 6, 8, 10, 22

Citizens To Preserve Overton Park v. *Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971) 18

Dickinson v. *United States*, 346 U.S. 389, 74 S.Ct. 152 (1953) 24, 25

Dillard v. *Industrial Commission of Virginia*, 416 U.S. 783, 94 S.Ct. 2028 (1974) 13

Lindahl v. *Office of Personnel Management*, 470 U.S. 768, 105 S.Ct. 1620 (1985) 4, 5, 6, 10, 15, 17, 18

Lindhal v. *Office of Personnel Management*, 776 F.2d 276 (Fed. Cir. 1985) 10, 12, 19, 21, 22, 23

Marcus v. *Califano*, 615 F.2d 23 (2d Cir. 1979) 12

McAulay v. *Heckler*, 749 F.2d 1500 (11th Cir. 1985) 11

Meighen v. *Office of Personnel Management*, 7 MSPB 82 (1981) 12

Motor Vehicles Manufacturers Association v. *State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 103 S.Ct. 2856 (1983) 6, 18

National Labor Relations Board v. *Klaue*, 523 F.2d 410 (9th Cir. 1975) 24

Parker v. *Defense Logistics Agency*, 1 MSPB 489 (1980) .. 6

Prestien v. *Office of Personnel Management*, 8 MSPB 345 (1981) 8, 10, 13, 14

Scroggins v. *United States*, 397 F.2d 295 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968) 5, 6, 15, 17, 18, 19, 21, 22, 25

Page

SEC v. *Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575 (1947) 15, 18
Shaw v. *Schweiker*, 536 F.Supp. 79 (E.D. Pa. 1982) 11
Simpson v. *Heckler*, 691 F.2d 966 (11th Cir. 1982) 11
Smith v. *Office of Personnel Management*, 784 F.2d 397 (Fed. Cir. 1986) 19, 22, 23, 25
Vaughn v. *Heckler*, 727 F.2d 1040 (11th Cir. 1984) 11
White Glove Building Maintenance, Inc. v. *Brennan*, 518 F.2d 1271 (9th Cir. 1979) 24

B. Decisions of the Civil Service Commission Appeals Review Board

RB083180037 (December 13, 1977) 14
RB083180042 (December 15, 1977) 14
RB083180077 (February 2, 1978) 14
RB083180090 (March 3, 1978) 14
RB083180105 (March 24, 1978) 14
RB083180153 (April 28, 1978) 14
RB083180173 (May 26, 1978) 14
RB083180196 (June 21, 1978) 14
RB083180225 (August 4, 1978) 13

C. Other Authorities

5 U.S.C. 7701(c) ..... *passim*
8337(a) 2, 5, 20
8337(c) 5, 15, 16
8337(d) 5, 16
8347(d)(1) 5, 10, 15
28 U.S.C. 1254(1) 1
30 U.S.C. 921(c) 12
33 U.S.C. 901, *et seq.* 13
920 13
922 13
42 U.S.C. 425 11

	Page
Pub. L. 95-454, 92 Stat. 1111, *et seq.*	2
Pub. L. 96-499, 94 Stat. 2605	5
5 C.F.R. 772.307 (1978)	14
772.310 (1978)	14
Part 831 subpart E (1978)	14
Part 831 subpart L (1978)	14
831.107 (1978)	14
831.109	16
831.502(a)	21
831.502(d)(2)	16
831.1205 (1978)	14
20 C.F.R. 410.414, *et seq.*	12
410.416(a)	12

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Opinion Below

The October 31, 1986 opinion of the United States Court of Appeals for the Federal Circuit, not reported, appears in the Appendix.

Jurisdiction

The judgment of the United States Court of Appeals for the Federal Circuit was entered on October 31, 1986. This petition for certiorari was filed within ninety days from that date. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

Statement of the Case

From October 22, 1967 to April 1977, petitioner Russell N. Pion served as a Social Insurance Representative, Social Security Administration ("SSA"), Department of Health, Education and Welfare,[1] in Pawtucket, Rhode Island. In 1977, the Bureau of Retirement, Insurance and Occupational Health, U.S. Civil Service Commission[2] approved petitioner's application for disability retirement based on a finding that bilateral cataracts rendered him "unable to render useful and efficient service" in a position which required extensive reading. See, 5 U.S.C. 8337(a).

This case originates with a 1985 decision of the U.S. Office of Personnel Management ("OPM") to terminate the disability retirement benefits of petitioner on the basis that he was "no longer disabled for useful and efficient service under the Civil Service Retirement law."[3] Petitioner subsequently filed a request for reconsideration with OPM and supported that request with a letter from his ophthalmologist, Dr. Paul Sydlowski, detailing his eye problems since 1977 and concluding that petitioner met the standards for being legally blind.[4] On July 25, 1985, the Office of Personnel Management, Reconsideration Branch, Disability and Special Entitlements Division, rejected petitioner's request for reconsideration based on a finding that Petitioner had "been employed since February 1981 as

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[1] Subsequent to 1977, the Agency was divided into the Department of Health and Human Services and the Department of Education.

[2] Pursuant to the Civil Service Reform Act of 1978, Pub. Law 95-454, 92 Stat. 1111, *et seq.*, responsibility for processing disability retirement applications was transferred to OPM. The Merit Systems Protection Board was granted jurisdiction over appeals from OPM disability retirement determinations.

[3] Initial Determination of Office of Personnel Management, undated. Petitioner's Appendix at 25. Petitioner's Appendix ("Pet. App.") refers to the appendix which accompanied petitioner's brief below.

[4] Pet. App. at 17-18. Although OPM's initial determination and petitioner's request for reconsideration are undated, both submissions were accepted as timely filed.

Senior Claims Examiner with the Department of Employment security (sic) for the State of Rhode Island" and "[t]his position appears to be similar to the position of Social Insurance Representative that you held prior to your retirement in 1977."[5]

Petitioner, proceeding *pro se*, filed a timely appeal of the OPM decision with Merit Systems Protection Board ("MSPB"). A hearing was held before a presiding official of the Board on September 16, 1985. OPM made no appearance at the hearing. It did, however, submit its retirement file on petitioner containing its summary termination of his benefits and its denial of his request for reconsideration. Petitioner appeared and testified about his medical condition and the difference between his former position with the Social Security Administration and his then current position with the State of Rhode Island.[6]

By decision dated September 25, 1985, the Board's presiding official concluded:[7]

> At the Board hearing, appellant testified that although he can work for the State of Rhode Island in the position of Senior Claims Examiner, he could not resume the duties of Social Insurance Representative. In a July 25, 1985 letter he described the difference between his old job and his current one. As a federal employee he read up to 1500 transmittals monthly. He was required to make field visits nand (sic) yearly reviews. In his state position appellant issues work to three field examiners; supervises front desk information; and answers letters and telephone inquiries. He explained that the physical requirements of the state job were far less that the (sic) those of federal (sic). He also noted that in the last year and a half he had to take over 300 hours of sick leave due to illness.

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[5] OPM's Reconsideration Decision, July 25, 1985. Pet. App. at 9-10.

[6] Petitioner has since retired from his position with the Department of Employment Security on a disability pension.

[7] *Pion* v. *Office of Personnel Management*, MSPB No. BN08318510181, Initial Decision, September 25, 1985; App. A-1.

> Appellant testified about his vision problems. He said he had only one good eye which gets tired with too much reading. He complained of frequent headaches from the minimal reading he was required to do for his state job.
>
> Based upon the record before me, I find that appellant has not shown he is disabled for useful and efficient service in the position of Social Insurance Representative. Dr. Sydlowski indicated appellant's eye problem would not keep him from being gainfully employed. . . . Although appellant credibly testified about the differences in the two jobs, this evidence is insufficient without medical evidence showing he was unable to perform the duties of his federal position. Therefore, I find he has not shown that his medical problem would keep him from performing his duties of Social Insurance Representative.

Petitioner filed a timely petition for review with the MSPB. By a short-form decision dated January 7, 1986, the Board denied review of petitioner's case.[8] Petitioner again filed a timely appeal with the U.S. Court of Appeals for the Federal Circuit alleging that the MSPB erred in allocating the entire burden of proof to federal annuitant recipients whose benefits are terminated on the basis of recovery and that it further erred in reaching a finding that was contrary to uncontroverted evidence which the Board's presiding official specifically found to be credible.

In an unpublished, nonprecedential decision,[9] the Federal Circuit rejected, without discussion, Petitioner's claims by merely observing:

> This court's review of Board decisions in disability retirement cases is controlled by *Lindahl* v. *Office of Personnel*

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[8] *Pion* v. *Office of Personnel Management*, MSPB No. BN08315810181, Final Decision, January 7, 1986; App. A-6.

[9] *Pion* v. *Office of Personnel Management*, No. 86-1006, October 31, 1986; App. A-8.

Management, 470 U.S. 768, 105 S.Ct. 1620 (1985). Review is limited to determining

> whether "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.' " [Citation omitted].

Id. at __, 105 S.Ct. at 1633, *quoting Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968). We must affirm the Board's decision because, on this record, such an error has not been established.

Slip Op. at 2.

Reasons for Granting the Writ

I. The Decision Below Denies Recipients of Federal Disability Retirement Benefits a Fair Hearing on Benefit Termination.

Federal employees with five years of creditable service are entitled to disability benefits if they become unable, through disease or injury, to provide useful and efficient service in the position last held by the employee. 5 U.S.C. 8337(a).[10] Employees who retire under this provision are subject to annual medical examinations, 5 U.S.C. 8337(c), and their benefits may be terminated by OPM if they are found to be recovered. 5 U.S.C. 8337(d). Decisions by OPM terminating disability retirement benefits on the grounds of recovery "may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board." 5 U.S.C. 8347(d)(1).

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[10] This provision was expanded in 1980 to include a requirement that the employee also be unable to render useful and efficient service in any vacant position at the same grade or level. See Pub. Law 96-499, 94 Stat. 2605. This case presents no issue with respect to reassignment since OPM has not contended that any such position was available and, in any event, Petitioner retired prior to the 1980 amendment.

In *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 105 S.Ct. 1620 (1985), this Court reversed a decision of the U.S. Court of Appeals for the Federal Circuit holding it did not have jurisdiction over appeals from MSPB decisions on disability retirement determinations of OPM where the applicant had voluntarily initiated the retirement application. Quoting *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968), this Court held that while factual review of MSPB decisions is not available, the Federal Circuit had jurisdiction to determine:

> . . . whether "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.' "
>
> *Lindahl*, *supra*, 470 U.S. at __, 105 S.Ct. at 1633.

Petitioner in the instant case alleges that the Board's decision to allocate both the burden of production of evidence and the burden of persuasion to annuitants whose disability retirement benefits are terminated on the basis of recovery is arbitrary and capricious and constitutes *Scroggins*-type error. The reasons advanced by the Board for its decision are either erroneous or do not support its conclusion. Even when Congress vests complete discretion in an administrative agency to establish procedures, "the agency must explain the evidence which is available, and must offer a 'rational connection between the facts and the choice made.' " *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 52, 103 S.Ct. 2856, 2871 (1983), quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246 (1962). In the absence of a rational connection, the agency's decision cannot be allowed to stand.

The Merit Systems Protection Board first considered the allocation of the burden of proof in disability retirement cases in *Chavez* v. *Office of Personnel Management*, 6 MSPB 343 (1981), a case involving denial of an initial disability retirement application. The Board found:

The legislative history discloses plainly that in enacting [5 U.S.C.] 7701(c), Congress addressed burdens and standards of proof only in the context of agency-initiated actions *against* employees (or applicants), as in misconduct or performance-related cases. As we pointed out in *Parker* v. *Defense Logistics Agency, supra,* 1 MPSB [489] at 503 [1980]:

> The attention of legislators throughout their consideration of the standards governing appeals to the Board was focused overwhelmingly on removal actions, whether based on performance or other reasons, with scant attention to the myriad other personnel actions appealable to the Board.

The legislative history contains no suggestion whatsoever that Congress intended to allocate the burden of persuasion to OPM in cases where the employee voluntarily initiates the action because he or she is seeking to establish entitlement to a benefit, as in employee applications for disability retirement.

The absence of any indicia of such a legislative intention is all the more telling in light of the clear and long-established practice of the Civil Service Commission to place the burden of persuasion upon the applicant in such appeals. Both the FEAA [Federal Employee Appeals Authority] and the ARB [Appeals and Review Board] consistently placed the burden on the appellant to prove by a preponderance of the evidence his or her entitlement to disability retirement. . . .

Allocation of the burden of persuasion to OPM would thus involve a complete reversal of the burden as consistently assigned under the former Commission's well-established practice, which was presumably known to Congress. It would also conflict with the generally accepted rule of law that the proponent of an action bears

> the burden of persuasion. It is well established that one who asserts entitlement to a benefit bears the burden of demonstrating that he or she meets the statutory criteria for such entitlement. Here, such a burden appropriately reflects the fact that the proponent of a voluntary disability retirement application normally possesses or has readier access to the evidence relating to his or her own medical condition, and further that it is usually impractical for an opposing party to prove a negative—in this instance, for OPM to prove that an applicant is not disabled.
>
> 6 MSPB 350-352 (footnotes omitted).

Petitioner does not contest that the Board acted within its discretion in allocating the burden of persuasion to annuitants who are voluntarily seeking disability retirement from their current federal positions. It is the application of this rationale to allocate both the burden of production of evidence and the burden of persuasion to annuitants whose benefits have been terminated on the basis of recovery that petitioner maintains is in error.

In *Prestien* v. *Office of Personnel Management*, 8 MPSB 345 (1981), the Board adopted the *Chavez* formula in cases involving an OPM determination to deny continued receipt of disability retirement benefits.

> . . . In *Chavez* the Board held that the applicant had the burden of proving entitlement to disability retirement. That holding was primarily based on two grounds: 1) that in passing the CSRA, Congress did not intend to disturb the practice of the former Civil Service Commission in placing the burden of proof on the claimant; and 2) that placing the burden on the claimant was consistent with the established principle of law that one who asserts entitlement to a statutory benefit bears the burden of demonstrating that he or she meets the statutory criteria for such entitlement. The Board also noted that such an allocation is fair because the

> claimant under normal circumstances either possesses or has readier access to the evidence relating to the disability and because it would be unfair to require OPM to prove a negative, i.e., that appellant is not disabled.
>
> These same considerations apply in the present case. Not only did the former Civil Service Commission place the burden of proof on the annuitant to demonstrate his or her continuing entitlement to disability retirement, but such an election is also fair and consistent with the established law. In view of these considerations the Board finds that the burden of proof is properly placed on the annuitant.
>
> 8 MPSB 349-350. (footnotes omitted).

The Board's failure to distinguish between federal employees seeking approval of their initial disability retirement applications and retired federal employees whose benefits are terminated is a failure that goes to the fundamental fairness of MPSB proceedings involving disability terminations as petitioner's case aptly demonstrates. Petitioner's initial application, an application which was supported by his employing agency, was approved on the basis that bilateral cataracts rendered him unable to read. As Edward A. Mace, Assistant Manager, SSA, Pawtucket, R.I., petitioner's supervisor, noted in the initial disability retirement application:

> In the last few weeks, Mr. Pion has been unable to perform the developmental and adjudicative duties of his job.
>
> We found it necessary to restrict his work to in-person interviewing. Mr. Pion has to use a magnifying glass to see small print and since the job entails dealing with small print, it became too time-consuming for him to try to continue his regular duties.

At the time OPM denied petitioner's request for reconsideration in 1985, he was still, according to his doctor, legally blind. OPM denied the reconsideration request on the basis that his job

with the State of Rhode Island "appeared" to be similar to his former federal position. OPM never questioned the medical evidence submitted. At the hearing, Petitioner concentrated his testimony on the differences between his current and former jobs. The presiding official specifically found this testimony to be credible.[11] And yet, the Board affirmed the OPM decision because petitioner had not submitted sufficient medical evidence in his behalf. OPM, for its part, was never required to produce any evidence of improvement in petitioner's condition or to relate any such improvement to his ability to render useful and efficient service in the position last held. This egregious result was obtained because the Board failed in *Prestien, supra*, to distinguish between the burden of production of evidence and the ultimate burden of persuasion and used faulty logic to adopt its previous holding in *Chavez, supra*.

In *Lindahl* v. *Office of Personnel Management*, 776 F.2d 276, 278 n.2 (Fed. Cir. 1985), (hereinafter "*Lindahl II*"),[12] the Federal Circuit approved the *Chavez* formula based on the Board's rationale that applicants bear the burden of establishing entitlement to such benefits as Social Security disability, black lung and workers' compensation under the Longshoremen's Compensation Act, and that it had been the practice of the former Civil Service Commission to place the burden of proof on annuitants. Noting that 5 U.S.C. 8347(d)(1) provides that retirement matters may be appealed to the MSPB "under procedures prescribed by the Board", the Court found the allocation of the burden of proof to initial disability retirement applicants "is permissible because it does not contravene the Civil Service Reform Act or that statute's legislative history." *Id.* at 279.

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[11] App. A-4.

[12] *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 105 S.Ct. 1620 (1985) was remanded to the Federal Circuit after this Court determined that *Scroggins*-type review existed for disability determinations. *Lindahl II* is the Federal Court's disposition of the case on remand. Lindahl subsequently filed a motion to proceed in forma pauperis in this Court and for an extension of time to file a petition for certiorari. The motion was granted at __ U.S. __, 106 S.Ct. 1632 (1986).

Although the Board was correct in stating that it is well established that one who asserts entitlement to a benefit bears the burden of proof with respect to that benefit, it was clearly in error in applying that tenet to this case. In cases involving Social Security disability, 42 U.S.C. 425, an example expressly cited by the Board, the applicant does bear both the burden of production of evidence and the burden of persuasion in establishing initial entitlement to the benefit. However, once the initial entitlement has been granted, it is the Secretary of Health and Human Services who bears the burden of producing sufficient evidence to demonstrate a significant improvement in the disabling condition when benefits are terminated on the basis of recovery. In order to meet that burden, the Secretary must produce substantial evidence that there has been an actual improvement in the condition to the point of no disability. *Simpson* v. *Heckler*, 691 F.2d 966 (11th Cir. 1982); *Vaughn* v. *Heckler*, 727 F.2d 1040 (11th Cir. 1984); *McAulay* v. *Heckler*, 749 F.2d 1500 (11th Cir. 1985). It is only in cases in which the Secretary meets this burden that the recipient must then shoulder the burden of persuasion to demonstrate the disabling condition still exists.

> [T]here can be no termination of benefits unless there is substantial evidence of improvement to the point of no disability. . . . Additionally, this court has held that a comparison of the original medical evidence and the new medical evidence is necessary to make a finding of improvement. . . .
>
> *McAulay, supra*, 749 F.2d at 1500.

See also, *Vaughn*, *supra*, 727 F.2d at 1043 n.11, citing *Shaw* v. *Schweiker*, 536 F.Supp. 79, 83 (E.D. Pa. 1982) (Initial disability determinations have a presumptive validity that is necessary to avoid a termination of benefits "without a showing either of improvement or newly-discovered evidence [since] such a termination would of necessity be based on whim or caprice or would constitute an impermissible relitigation of facts and determinations already decided.")

The Board often looks to Social Security disability cases for guidance in adjudicating disability retirement appeals. *See, e.g., Meighen* v. *Office of Personnel Management*, 7 MSPB 82, 84 n.2 (1982), citing *Marcus* v. *Califano*, 615 F.2d 23, 27 (2d Cir. 1979) (Failure of an appellant's physician to identify the cause of the medical condition does not render the claim any less credible.) At no point, however, has the Merit Systems Protection Board or the Federal Circuit even attempted to explain why it should follow Social Security disability cases in some instances and depart from those cases in other instances.[13]

Procedures applicable to black lung benefits under the Federal Coal Mine Health and Safety Act and workers' compensation under the Longshoremen's Compensation Act are inapposite due to the lack of similarity of those statutes with the Civil Service Retirement Act. Under the Federal Coal Mine Health and Safety Act, the applicant for benefits technically bears the burden of proof. However, the applicant is aided by several evidentiary presumptions which, in effect, shift the burden of proof to the agency. See 30 U.S.C. 921(c) and 20 C.F.R. 410.414, *et seq.* For example, once the employee establishes that he was employed in a coal mine for 10 or more years and suffers from pneumoconiosis, "it will be presumed, in the absence of persuasive evidence to the contrary, that the pneumoconiosis arose out of such employment." 20 C.F.R. 410.416 (a). Unlike disability retirement determinations, the Federal Coal Mine Health and Safety Act does provide for judicial review of administrative factual determinations under

[13] Counsel remains mystified as to the rationale behind the Federal Circuit's affirmance of the Board's decision in this case. Although the Federal Circuit had ruled only on the burden of proof in initial disability applications, see *Lindahl II*, *supra*, 776 F.2d at 280, the Court affirmed the Board's decision in petitioner's case in an opinion unpublished because of its lack of precedential value. Not only has the Court made a decision which significantly affects disability retirement annuitants, but it has done so in a fashion that leaves the door open for "recovered" annuitants to pursue the same appeal into the Federal Circuit unaware that the Court has already rejected the rationale advanced by petitioner.

the substantial evidence standard. *Brock* v. *Weinberger*, 405 F.Supp. 1329 (W.D. Ark. 1975). Finally, the Act does not provide for termination of benefits on the basis of recovery. It is also true that the employee bears the burden of establishing entitlement to benefits under the Longshoremen's Compensation Act, 33 U.S.C. 901, *et seq*. But again, the employee is aided by certain evidentiary presumptions not present under the Civil Service Retirement Act. See 33 U.S.C. 920. And, since either party may apply for a modification of the award based on a change in conditions, 33 U.S.C. 922, the burden of proof is not mechanically placed on either party. Cf. *Dillard* v. *Industrial Commission of Virginia*, 416 U.S. 783, 94 S.Ct. 2028 (1974) (Under Virginia worker's compensation laws, the employer bears the burden of proof when asserting a change in condition.)

The reliance of both the Board and the Federal Circuit on these statutes to justify placing the entire burden of proof on annuitants whose benefits are terminated on the basis of recovery is entirely misplaced. Far from supporting that allocation of the burden of proof, the cited examples demonstrate that former federal employees are treated differently than their private industry counterparts for no apparent reason.

Equally misplaced is any reliance upon the practices of the former Civil Service Commission ("CSC") in its processing of disability retirement claims. In *Prestien* v. *Office of Personnel Management*, *supra*, 8 MSPB at 350 n.7, the Board cited several cases decided by the CSC Appeals Review Board and concluded that it placed the burden of proof on annuitants to establish their entitlement to continued receipt of benefits. The cited cases provide a less than clear analysis of the burden of proof and, in fact, there is no discussion of the burden of proof in these cases. A fair reading of the cases suggests that the Appeals Review Board based its recovery assessments on an evaluation of all the evidence submitted without formal consideration of the burden of proof. See, e.g., Decisions of the Civil Service Commission Appeals Review Board RB083180225 (August 4, 1978);

RB083180173 (May 26, 1978); RB083180196 (June 21, 1978); RB083180037 (December 13, 1977); RB083180042 (December 15, 1977); RB083180077 (February 2, 1978); RB083180090 (March 3, 1978); RB083180105 (March 24, 1978); RB083180153 (April 28, 1978).[14]

Assuming, *arguendo*, that the Civil Service Commission did place the burden of proof, including the burden of production of evidence, on the annuitant, the past practices of that agency are of little value considering the sweeping changes the Civil Service Reform Act made in the processing of disability retirement cases. As the MSPB itself noted in *Prestien* v. *Office of Personnel Management*, *supra*, 8 MPSB at 349 n.5:

> The [Civil Service] Commission's procedures provided that decisions of the BRIOH [Bureau of Retirement, Insurance and Occupational Health] under 5 C.F.R. Part 831 subpart L (1978), pertaining to disability retirement on application of an agency or an employee were appealable *de novo* to the Commission's Federal Employee Appeals Authority (FEAA) with the right to a hearing pursuant to 5 C.F.R. 831.1205 (1978). *See* 5 C.F.R. 772.307 (1978). However, decisions of BRIOH under 5 C.F.R. Part 831 subpart E (1978), pertaining to eligibility for retirement including recovery from disability and restoration to earning capacity were appealable on the record to the ARB under 5 C.F.R. 831.107 (1978). No right to a hearing was provided before the ARB and there was no further appeal. *See* 5 C.F.R. 772.310 (1978).

When Congress, by statute, grants the right to a hearing where no such right had previously existed, it is by no means clear that it meant to perpetuate past practices. Even though the legislative history of the Reform Act is silent on this point, it must

[14] The Appeals Review Board expunged all names and identifying references from its decisions on disability retirement cases. Therefore, cases are identifiable only by docket number and date of decision.

be presumed that Congress was aware that it was effecting such a fundamental change in the handling of disability retirement benefit terminations. Thus, the past practices of the Civil Service Commission lend no support for the Board's position unless the rationale behind those practices is equally applicable to the present situation. Congress expressly released the Board from any obligation to follow in the footsteps of the Civil Service Commission through enactment of 5 U.S.C. 8347(d)(1), which provides that decisions by the Office of Personnel Management terminating disability retirement benefits on the grounds of recovery "may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board."

That Congress has given the Board authority to adopt its own procedures for processing disability retirement cases does not mean the Board is free to enact arbitrary and capricious procedures. *Lindahl* v. *Office of Personnel Management*, *supra*, 470 U.S. at __, 105 S.Ct. at 1633, citing *Scroggins* v. *United States*, *supra*, 397 F.2d at 297, *cert. denied*, 393 U.S. 952 (1968). The Board's procedures must stand or fall on the basis of the reasons advanced by the Board for adopting those procedures. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196, 62 S.Ct. 1575, 1577 (1942). Petitioner in this case has conclusively demonstrated that the Board misunderstood the so-called "established law" with respect to termination of entitlements and failed to place any emphasis on fundamental changes implemented by Congress in the Civil Service Reform Act. Other reasons advanced by the Board for placing the entire burden of proof on "recovered" annuitants become specious upon full examination.

The Board found that it would be unfair to place any burden on the Office of Personnel Management because the annuitant has readier access to medical evidence and, otherwise, OPM would be required to prove a negative; i.e., that the annuitant is no longer disabled. But, disability retirement annuitants are required to undergo medical examinations annually until the age of 60, 5 U.S.C. 8337(c), and the Office can require additional

examinations at any time. 5 C.F.R. 831.502(d)(2). Failure of a disability retirement recipient to submit to an examination results in an immediate suspension of the annuity. 5 U.S.C. 8337(c). Under the Reform Act, OPM suffers from no inability to collect the relevant medical evidence. Moreover, 5 U.S.C. 8337(d) provides:

> If an annuitant receiving disability retirement from the Fund, before becoming 60 years of age, recovers from his disability, payment of the annuity terminates on reemployment by the Government or 1 year after the date of the medical examination showing the recovery, whichever is earlier. . . .

The plain language of the statute does not require the annuitant to continually prove entitlement to disability retirement benefits. Rather, it presumes continuing disability and places on OPM the responsibility of determining whether an annuitant has recovered. There is nothing inherently unfair in this requirement. By the time a case reaches the Board, the Office of Personnel Management has issued both an initial decision and a final decision based upon reconsideration. See, 5 C.F.R. 831.109. Presumably, when a case reaches the Board, the Office will know precisely why it has deemed the annuitant to be recovered and would be at no disadvantage in presenting those reasons to the Board prior to requiring the annuitant to rebut that evidence and establish his or her right to continuing benefits. Conversely, the annuitant, under the Board's current procedures, can be required time and time again to prove entitlement to disability retirement benefits based on the submission of new evidence. The annuitant must do so unaided by a clear framing of the issues before the Board since OPM is not required to justify its decision to terminate benefits. *See, Armstrong* v. *Office of Personnel Management*, 7 MSPB 286, 288 (1981) ("The inadequacy of the OPM response [has] no bearing on appellant's burden of persuasion.") The result of those procedures is readily apparent

in petitioner's case. OPM deemed petitioner to be recovered not on the basis of medical evidence, but on the basis that his then current position with the State of Rhode Island "appeared" to be similar to his former position of Social Insurance Representative.[15] At the MSPB hearing, petitioner concentrated his evidence on demonstrating the difference between those two positions.[16] The Board's presiding official specifically found petitioner's testimony to be credible on this point,[17] but ruled that the medical evidence was insufficient to support a finding of continued disability.[18] The rather anomalous result is that the Board upheld OPM's determination for a reason which OPM had never asserted. When a Board-adopted procedure can lead to such a result, surely this is the type of error referred to by the so-called *Scroggins* standard of review.

> . . . The Subcommittee [on Compensation and Employee Benefits of the House Committee on Post Office and Civil Service] emphasized its understanding that [5 U.S.C.] 8347(c) did not "eliminate the constitutional right of appeal to the courts in the case of official 'arbitrary and capricious conduct.' "
>
> *Lindahl* v. *Office of Personnel Management*, *supra*, 470 U.S. at __, 105 S.Ct. at 1629.

The Board's assignment of both the burden of production of evidence and the burden of persuasion to disability retirement annuitants whose benefits have been terminated on the basis of recovery is based on a misconstruction of established law and past practices as well as reasoning which flies in the face of the statutory scheme.

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[15] OPM's Reconsideration Decision, July 25, 1985. Pet. App. at 9-10.

[16] *Pion* v. *Office of Personnel Management*, MSPB No. BN08318510181, Hearing Transcript, pp. 1-13, September 16, 1985. Pet. App. at 117-129.

[17] *Pion* v. *Office of Personnel Management*, MSPB No. BN08318510181, Initial Decision at p. 3, September 25, 1985. App. A-4.

[18] *Id.*

> . . . The scope of review under the "arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made". *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 245-246, 9 L.Ed.2d 207 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, 419 U.S. at 285, 95 S.Ct. at 442; *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 416, 91 S.Ct. at 823. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947).
>
> *Motor Vehicles Manufacturers Association*, *supra*, 463 U.S. at 43, 103 S.Ct. at 2866-67.

This Court should issue a writ of certiorari to review the allocation of the burden of proof in disability retirement termination cases since it constitutes "a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.' " *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, __, 105 S.Ct. 1620, 1633 (1985) quoting *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968).

II. THE *Scroggins* DOCTRINE, WHICH PROHIBITS JUDICIAL REVIEW OF AGENCY FACTUAL DETERMINATIONS, DOES NOT PRECLUDE A COURT FROM REVERSING AN AGENCY DETERMINATION LACKING ANY SUPPORT IN THE RECORD.

During oral argument, the Federal Circuit panel declined to rule on petitioner's contention that the *Scroggins* doctrine, although barring any evidentiary review of agency factual determinations, does not bar the Court from reversing decisions which are unsupported by any evidence in the record. *See also*, *Smith* v. *Office of Personnel Management*, 784 F.2d 397 (Fed. Cir. 1986). Petitioner maintains that the Federal Circuit's reading of *Lindahl* v. *Office of Personnel Management*, *supra*, is overly restrictive and that decisions of the Merit Systems Protection Board which lack any support in the record are arbitrary and capricious and, as such, constitute a "like error going to the heart of the administrative determination."

Neither OPM nor the MSPB contested the medical evidence submitted in petitioner's behalf. That evidence consisted of a two-page letter submitted by petitioner's ophthalmologist summarizing the seven year history of petitioner's eye problems and indicating that petitioner was legally blind. According to Dr. Sydlowski, petitioner's vision was 20/400 in his right eye and, with a contact lens, was 20/25 in his left eye but with a visual field of only 20 to 25 degrees.[19] Dr. Sydlowski also stated that petitioner's eye problems did not prevent him from being "gainfully employed without reliance on his loss of peripheral field."[20] OPM terminated petitioner's disability benefits due to recovery on the basis that "you have been employed since February 1981 as Senior Claims Examiner with the Department of Employment security (sic) for the State of Rhode Island. This position appears to be similar to the position of Social Insurance Representative that you held prior to your retirement in 1977."[21]

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[19] Pet. App. at 17-18.

[20] *Id.* at 18.

[21] *Id.* at 9.

At the MSPB hearing, petitioner testified about the differences in his then current position with the State of Rhode Island and his former federal position, which required reading some 1,500 transmittals monthly.[22]

> See my problem with reading—I put the contact in, when I put the contact in it corrects my vision from 20-400 to 20-30 which is fine to get around. I have no peripheral vision. . . .
>
> If I want to read anything I have to put my reading glasses on because my contact only gives me 20-30 vision. I can't read. Anything I read if the type changes from regular type to say italic printing or from handwritten to typewritten, when I—I'm adjusting my contact and my reading glasses, and I have to, you know, be moving the paper back and forth. It does make it somewhat of a problem—a great problem. I used to be an avid reader.

In addition, petitioner testified that in the year and a half prior to the hearing he was required to take approximately 300 hours of sick leave from his state position.[23]

The Board's presiding official specifically found petitioner's testimony to be credible, but that "this evidence is insufficient without medical evidence showing he was unable to perform the duties of his former federal position."[24] The Board's ultimate conclusion is contrary to all of the evidence submitted and was reached, in part, because the presiding official applied an improper standard in making the recovery determination.

Under 5 U.S.C. 8337(a), an employee is not required to demonstrate that he or she is totally unfit for any meaningful employment. Rather, the employee must demonstrate that he or she is unable to render useful and efficient service in the position last held. Useful and efficient service means:

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[22] *Id.* at 120, 128.

[23] App. at A-2.

[24] App. at A-4.

(1) either acceptable performance of the critical or essential elements of the position or the ability to perform at that level; and
(2) satisfactory conduct and attendance.

5 C.F.R. 831.502(a).

As petitioner's supervisor stated in the original 1977 application for disability retirement:[25]

> . . . Mr. Pion has been unable to perform the developmental and adjudicative duties of his job.
>
> We [the Agency] found it necesary to restrict his work to in-person interviewing. Mr. Pion has to use a magnifying glass to see small print and since the job entails dealing with small print, it became too time-consuming for him to try to continue his regular duties.

Petitioner placed himself *prima facie* within the statutory criteria for continuation of disability retirement benefits. OPM presented no evidence to rebut or even question petitioner's eligibility. Yet the Board determined that petitioner had not carried his burden of proof and the Federal Circuit declined review on the basis that *Lindahl*, *supra*, and *Scroggins*, *supra*, bars the Court from overturning findings which have no basis of support in the record.

> *Lindahl* does not broadly authorize us to review any error "going to the heart of the administrative determination," but only any such "like" error. "Like" refers to the two prior types of error specifically described: "[a] substantial departure from important procedural rights" or "a misconstruction of the governing legislation." The errors that the "heart" category permits us to review are those of similar character and magnitude to the first two categories. The sufficiency of the evidentiary support for the Board's deci-

[25] Pet. App. at 67.

> sion ordinarily would not be viewed as a question of procedural rights or construction of legislation, or analogous or comparable to those questions.
>
> . . . .
>
> Acceptance of petitioner's theory could produce a serious erosion of the restriction upon our jurisdiction that *Lindahl* provided. Skilled lawyers easily can frame challenges to the factual basis of Board disability determinations so as to bring them within the broad scope that the petitioner would give to the limited exception to our jurisdiction that *Lindahl* recognized. Indeed, since the Supreme Court decision in *Lindahl*, there have been several cases in which factual challenges to disability determinations have been camouflaged as procedural defects and errors going to the "heart of the administrative determination." We repeatedly have rejected those attempts to avoid the limitation on our jurisdiction *Lindahl* imposed. . .
>
> *Smith* v. *Office of Personnel Management*, *supra*, at 784 F.2d 400.

It is indeed ironic that the very decision which reopened the Federal Circuit to disability retirement annuitants is now cited by that Court as some exceptional limitation on its jurisdiction. In *Smith*, *supra*, 784 F.2d at 401, the Court went on to find that it could not address petitioner's allegations that the Board committed legal error in determining the appellant to be recovered by using a standard which had been repealed.

> In any event the determination whether the petitioner would have prevailed under the new standard depends upon an evaluation of the record in the light of that standard. To overturn the Board's finding that any error resulting from application of the prior standard was not prejudicial would require this court to review the evidence relating to disability—an inquiry we cannot make under *Lindahl*.
>
> *Id.* at 401.

The Court's ruling results in the proverbial "Catch 22". In order to prevail under the *Scroggins* standard of review, an appellant must show more than mere error; the appellant must show the error was a "substantial departure from important procedural rights" or a "like error going to the heart of the administrative determination." By refusing to even review the impact of any alleged error, the Federal Circuit precludes an appellant from making the showing necessary to prevail under *Lindahl*. Not even the Board itself has placed such a restrictive reading on judicial review under *Scroggins*.

> . . . Despite their [the court's] aversion to reviewing the [Civil Service] Commission's determinations, the courts did review the records of the administrative proceedings to ascertain the existence of some evidence to support the Commission's disability determinations. The courts equated any harmful misjudgment by the Commission in evaluating the evidence to "an error going to the heart of the administrative determination." The courts made it plain, however, that they could not weigh the evidence or even apply the conventional "substantial evidence" standard for review of the Commission's disability determinations.
>
> *Chavez* v. *Office of Personnel Management*, *supra*, 6 MSPB at 347. (footnote omitted)

The Federal Circuit has seemingly confused review of the record to determine weight and sufficiency of evidence with review of the record to determine whether an established legal error rises to the level of harmful under the *Scroggins* standard. In *Allen* v. *United States*, 571 F.2d 14, 18-19 (Ct. Cl. 1978), the court determined that it was error for the Civil Service Commission to fail to include the military duties of a National Guard technician in assessing his application for disability retirement and finding that he was not totally disabled to perform his civilian duties. The Court then reversed the Commissions's finding and granted the appellant a disability annuity. Under the

Federal Circuit's interpretation of *Lindahl* such a result could not be obtained because the Court would be barred from considering any factual evidence relating to an appellant's ability to perform the duties ignored by the agency in making its determination. *Smith, supra,* is ample demonstration of that fact.

"While the trier of fact may reject uncontroverted testimony, he may not do so without good reason." *National Labor Relations Board* v. *Klaue*, 523 F.2d 410, 414 (9th Cir. 1975), citing *White Glove Building Maintenance, Inc.* v. *Brennan*, 518 F.2d 1271 (9th Cir. 1975). To reject uncontroverted evidence without good reasons is arbitrary. *Id.* The fact that a statute precludes judicial review of agency factual determinations does not prohibit the court from reviewing the record for a total absence of proof to support the agency's determination. *Dickinson* v. *United States*, 346 U.S. 389, 74 S.Ct. 152 (1953). In reversing the determination of a local selective service board that Dickinson was not entitled to a ministerial exemption, this Court found the agency could not reject uncontroverted evidence offered by Dickinson.[26] Based on Dickinson's uncontroverted testimony with respect to his status and activity as a Jehovah's Witness minister, the Court ruled that the Board had committed error in denying Dickinson the exemption.

> Local boards are not courts of law and are not bound by traditional rules of evidence; they are given great leeway in hearing and considering a variety of material as evidence. If the facts are disputed the board bears the ultimate responsibility for resolving the conflict—the courts will not

[26] The Board's denial of Dickinson's exemption came under the Universal Military Training and Service Act, a statute with judicial review provisions not unlike the statute at issue in this case. ". . . the Act provides . . . that classification orders by selective service authorities shall be 'final' . . . . The provision making the decisions of the local board 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that courts are not to weigh evidence to determine whether the classification made by local boards was justified. 346 U.S. at 394, 74 S.Ct. at 156.

> interfere. Nor will the courts apply a test of "substantial evidence." However, the court may properly insist that there be some proof that is incompatible with the registrant's proof of exemption.... [W]hen uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.
>
> 346 U.S. at 396-397, 74 S.Ct. at 157-58.

Cf., *Armstrong* v. *Office of Personnel Management*, 7 MSPB 286 (1981) (Case remanded to OPM for further consideration where applicant places himself prima facie within statutory criteria for disability retirement and OPM has no legal grounds for rejection of claim)

Petitioner in this case placed himself prima facie within the statutory criteria for disability retirement by presenting medical evidence that he is legally blind, that his former job with SSA required extensive reading and that he could not, due to his poor eyesight, perform those critical functions of his former position which required extensive reading. Petitioner's claim was rejected on the basis that the medical evidence did not support a finding that he was disabled for any gainful employment—a finding not responsive to the statutory criteria. This is not, as the Federal Circuit stated in such a cavalier manner in *Smith*, *supra*, an attempt by "skilled lawyers" to avoid *Scroggins*. It is an error which goes to the very "heart of the administrative determination"—a determination based solely on the speculation of the Board's presiding official that since petitioner could perform the duties of a position which was admittedly significantly different from his former federal position, he could perform useful and efficient service in his former federal job. There is no support in the record for that finding and it is, thus, "both contrary to the spirit of the [Civil Service Retirement] Act and foreign to our concepts of justice."

Conclusion

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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Appendix

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

CASE NO. BN08318510181

RUSSELL N. PION
APPELLANT

v.

OFFICE OF PERSONNEL MANAGEMENT
AGENCY

DATE: SEPTEMBER 25, 1985

MARSHA MEARNS SAYLOR, *Presiding Official*

DECISION

By petition received August 5, 1985, appellant sought to appeal the July 25, 1985 reconsideration decision of the agency that appellant was no longer medically disabled. For the reasons set forth below, the agency's decision is AFFIRMED.

JURISDICTION

Section 8347(d)(1) of Title 5, U.S. Code gives a right of appeal to an individual whose rights or interests are affected by an administrative action or order issued by OPM. The July 25, 1985 reconsideration decision is such an action or order taken by OPM pursuant to its authority under 5 U.S.C. §8337(d). Therefore, appellant has the right of appeal to the Board. 5 U.S.C. §7701(a); 5 C.F.R. §831.110.

FINDINGS AND CONCLUSIONS

In an undated letter, the agency informed appellant that it found him to have recovered from his disability because his medical condition had improved.

By an undated letter, appellant sought to appeal the agency's decision that he had recovered from his disability. By letter dated July 25, 1985 the agency issued a reconsideration decision which reaffirmed its earlier decision that appellant had recovered from his disability.

Appellant was a Social Insurance Representative, GS-10, for the Social Security Administration. Appellant's position required him to read extensive documentation and issue decisions on such issues as retirement, survivors, disability, black lung, health insurance benefits and eligibility for supplemental security income payments. (*See* Job Description included in Agency Appeal File, Tab E).

Appellant was disabled, because of his poor vision. By letter dated April 29, 1977, the agency granted appellant his application for disability retirement.

At the Board hearing, appellant testified that although he can work for the State of Rhode Island in the position of Senior Claims Examiner, he could not resume the duties of Social Insurance Representative. In a July 25, 1985 letter he described the difference between his old job and his current one. As a federal employee he read up to 1500 transmittals monthly. He was required to make field visits and yearly reviews. In his state position appellant issues work to three field examiners; supervises front desk information; and answers letters and telephone inquiries. He explained that the physical requirements of the state job were far less than those of federal. He also noted that in the last year and a half he had to take over 300 hours of sick leave due to illnesses.

Appellant testified about his vision problem. He said he had only one good eye which gets tired with too much reading. He complained of frequent headaches from the minimal reading he was required to do for his state job.

Appellant also testified that his leg problem would keep him from performing the duties of his position. Both of appellant's legs were ulcerated. Appellant stated he could only do limited walking. Appellant's legs were swollen from severe statis with intermittent severe dermatitis. Appellant submitted an August 20, 1985 letter from Dr. Gerald Foster, M.D., a dermatologist. Dr. Foster indicated appellant was under his care for the past four years. He diagnosed appellant's condition as follows: severe statis, changes of the lower axhemehis, with intermittent severe dermatitis and what seems to be an almost permanent ulcer of the left ankle.

The agency submitted a June 17, 1985 letter from Dr. Paul Sydlowski, M.D., a specialist in Ophthalmology. Dr. Sydlowski indicated that appellant had been his patient for eight years. In 1977 appellant's vision was 20/400 and 20/200. Cataract surgery was performed in 1977. Appellant had four other operations on his eye resulting in a 20/25 range in his one good eye (the other remained 20/400.) He indicated appellant could not drive because he was legally blind. He noted appellant could be gainfully employed without reliance on his loss of peripheral field.

The Board held in *Pretien* v. *Office of Personnel Management*, 8 MSPB 345 (1981) that an appellant bears the burden of proof in appeal under 5 U.S.C. §8347(d) of an action brought by OPM to discontinue a voluntary disability retirement annuity due to annuitant's alleged recovery from disability. Further, the Board decided the standard of proof in these appeals in *Chavez* v. *Office of Personnel Management*, 6 MSPB 343 (1981).

Based upon the record before me, I find that appellant has not shown he is disabled for useful and efficient service in the position of Social Insurance Representative. Dr. Sydlowski indicated appellant's eye problem would not keep him from being gainfully employed. Additionally, appellant's leg problem did not prevent him from successfully working at a sedentary job for several years for the State of Rhode Island. Appellant's former position of Social Insurance Representative is a sedentary position

much like the position he has been performing with Rhode Island. Although appellant credibly testified about the differences in the two jobs, this evidence is insufficient without medical evidence showing he was unable to perform the duties of his former federal position. Therefore, I find he has not shown that his medical problem would keep him from performing his duties of Social Insurance Representative.

REVIEW RIGHTS

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on (sic) unless a petition for review is filed with the Board or the Board reopens the case on its own motion. 5 C.F.R. §1201.113 and .117.

Any party to this appeal may file a petition for review of this initial decision with the Merit Systems Protection Board. All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The Board may grant a petition for review when the criteria set out in 5 C.F.R. §1201.115 are met.

The petition for review must be filed no later than (sic) with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

One original and one copy of the petition must be filed with the Clerk of the Board. (It is not necessary to serve the Regional Office.) The parties should note, that, pursuant to recent amendments effective August 1, 1985, they are now required to serve any petition for review and any subsequent pleadings on all other parties. A copy of these important amendments is attached to this decision. For additional information see 50 Fed. Reg. 28895.

Appellant may seek judicial review of the Board's decision by filing a petition for review with:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

The court's jurisdiction in this case, however, is limited to determining whether "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination." *Lindahl* v. *Office of Personnel Management*, __ U.S. __, 105 S.Ct. 1620, 1633 (1985). The petition for review must be received by the court no later than thirty (30) days after the Board's decision becomes final. 5 U.S.C. §7703(b)(1).

For the Board:

(s) MARSHA MEARNS SAYLOR
MARSHA MEARNS SAYLOR
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NO. BN08318510181

RUSSELL N. PION
APPELLANT

v.

OFFICE OF PERSONNEL MANAGEMENT
AGENCY
(CSA 2 019 274)

BEFORE
HERBERT E. ELLINGWOOD, *Chairman*
MARIA L. JOHNSON, *Vice Chair*
DENNIS M. DEVANEY, *Member*

ORDER
DATE: JAN 07 1986

Having considered the appellant's petition for review of the initial decision issued on September 25, 1985, and finding that it does not meet the criteria for review set forth at 5 C.F.R. §1201.115, the Board hereby DENIES the petition.*

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. §1201.113(b).

* *See Avansino* v. *U.S. Postal Service*, 3 MSPB 308 (1980) and *Russo* v. *Veterans Administration*, 3 MSPB 427 (1980) (the Board will not consider "new and material evidence" on review absent a showing that it was unavailable, despite the exercise of due diligence in obtaining it, before the record was closed and that it is of sufficient weight to warrant an outcome different than that of the initial decision); *Weaver* v. *Department of the Navy*, 2 MSPB 297 (1980), *aff'd*, 669 F.2d 61 (9th Cir. 1982) (appellant's mere disagreement with the presiding official's factual determinations does not provide a basis for Board review).

The appellant is hereby notified of the right under 5 U.S.C. §7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

(s) ROBERT E. TAYLOR
ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

NOTE: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals
For the Federal Circuit

APPEAL NO. 86-1006

RUSSELL N. PION,

PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT,

RESPONDENT.

BEFORE

RICH, SMITH, and NIES, *Circuit Judges.*

DECISION

DECIDED: October 31, 1986

SMITH, *Circuit Judge.*

The January 7, 1986, final decision of the Merit Systems Protection Board (board), docket No. BN08318510181, which decision sustained the termination of disability retirement benefits to Russell N. Pion (Pion) on the ground of recovery from disability, is *affirmed.*

OPINION

Pion was initially determined to be entitled to disability retirement benefits in April 1977. In 1985, the Office of Personnel Management determined that Pion was no longer disabled and concluded that he was no longer eligible to receive those benefits. Pion appeals from the board's affirmance of that decision.

This court's review of board decisions in disability retirement cases is controlled by *Lindahl* v. *Office of Personnel Management*, __ U.S. __, 105 S.Ct. 1620 (1985). Review is limited to determining

> whether "there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error 'going to the heart of the administrative determination.' " [Citation omitted.]

Id. at __, 105 S.Ct. at 1633, *quoting Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968). We must affirm the board's decision because, on this record, such an error has not been established.

RELEVANT STATUTES AND REGULATIONS

5 U.S.C. 8337

(a) An employee who completes five years of civilian service and has become disabled shall be retired on the employee's own application or on application by the employee's agency. Any employee shall be considered to be disabled only if the employee if[1] found by the Office of Personnel Management to be unable, because of disease or injury, to render useful and efficient service in the employee's position and is not qualified for reassignment, under procedures prescribed by the Office, to a vacant position which is in the agency at the same grade or level and in which the employee would be able to render useful and efficient service. . . .

. . . .

(c) An annuitant receiving disability retirement annuity from the Fund shall be examined under the direction of the Office—

(1) at the end of 1 year from the date of the disability retirement; and

(2) annually thereafter until he becomes 60 years of age;

unless his disability is permanent in character. If the annuitant fails to submit to examination as required by this section, payment of the annuity shall be suspended until continuance of the disability is satisfactorily established.

(d) If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, recovers from his disability, payment of the annuity terminates on reemployment by the Government or 1 year after the date of the medical examination showing the recovery, whichever is earlier. If an annuitant receiving disability retirement annuity from the Fund, before becoming 60 years of age, is restored to an earning capacity fairly comparable to the current rate of pay of the position occupied at the time of retirement, payment of the annuity terminates on reemployment by the Government or 180 days after the end of the calendar year in which earning capacity is so

restored, whichever is earlier. Earning capacity is deemed restored if in any calendar year the income of the annuitant from wages or self-employment or both equals at least 80 percent of the current rate of pay of the position occupied immediately before retirement.

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5 U.S.C. 8347

(a) The Office of Personnel Management shall administer this subchapter. Except as otherwise specifically provided herein, the Office shall perform, or cause to be performed, such acts and prescribe such regulations as are necessary and proper to carry out this subchapter.

(b) Applications under this subchapter shall be in such form as the Office prescribes. Agencies shall support the applications by such certificates as the Office considers necessary to the determination of the rights of applicants. The Office shall adjudicate all claims under this subchapter.

(c) The Office shall determine questions of disability and dependency arising under this subchapter. Except to the extent provided under subsection (d) of this section, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.

(d)(1) Subject to paragraph (2) of this subsection, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.

(2) In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was made pursuant to an application by an agency for purposes of disability retirement under section 8337(a) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

. . . .

Supreme Court, U.S.
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CLERK

No. 86-1224

In the Supreme Court of the United States

OCTOBER TERM, 1986

RUSSELL N. PION, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board abused its discretion by assigning to petitioner the burden of proving his continuing eligibility for civil service disability retirement benefits.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Statement	2
Argument	4
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Chavez v. *OPM*, 6 M.S.P.R. 404 (1981)	7
Heckler v. *Kuehner*, 469 U.S. 977 (1984)	10
Heckler v. *Lopez*, 469 U.S. 1082 (1984)	10
Lee v. *OPM*, 762 F.2d 987 (Fed. Cir. 1985)	13
Lindahl v. *OPM*, 470 U.S. 768 (1985), on remand, 776 F.2d 276 (Fed. Cir. 1985), cert. denied, No. 85-6214 (May 12, 1986)	4, 5, 6, 7, 12, 13
Matthews v. *Eldridge*, 424 U.S. 319 (1976)	9
McAulay v. *Heckler*, 749 F.2d 1500 (11th Cir. 1985)	9
Prestien v. *MSPB*, 8 M.S.P.R. 698 (1981)	5, 8
Simpson v. *Schweiker*, 691 F.2d 966 (11th Cir. 1982)	9
Scroggins v. *United States*, 397 F.2d 295 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968)	4
Smith v. *OPM*, 760 F.2d 244 (Fed. Cir. 1985)	13
Smith v. *OPM*, 784 F.2d 397 (Fed. Cir. 1986)	13
United States v. *Erika, Inc.*, 456 U.S. 201 (1982)	7
United States v. *New York, N.H. & H.R.R.*, 355 U.S. 253 (1957)	8
Vaughn v. *Heckler*, 727 F.2d 1040 (11th Cir. 1984)	9
Warren v. *Bowen*, 804 F.2d 1120 (9th Cir. 1986)	11

Statutes and rule: Page

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* 2, 8
5 U.S.C. 7701 6
5 U.S.C. 7701(c)(1)(B) 6
5 U.S.C. 7703(b)(1) 4
Civil Service Retirement Act, 5 U.S.C. 8301 *et seq.*:
5 U.S.C. 8337(d) 2
5 U.S.C. 8347 ..... 2, 5
5 U.S.C. 8347(a) 5
5 U.S.C. 8347(b) 5
5 U.S.C. 8347(c) 5, 12, 13
5 U.S.C. 8347(d)(1) 5, 7
5 U.S.C. 8347(d)(2) 6, 7
Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, 42 U.S.C. (& Supp. III) 421 *et seq.* 9
§ 2(a), 98 Stat. 1794 (42 U.S.C. (Supp. III) 423(f)) 9, 10
§ 2(a), 98 Stat. 1794 (42 U.S.C. (Supp. III) 423(f)(1)) 10
§ 2(d)(2)(C), 98 Stat. 1797 (42 U.S.C. (Supp. III) note) 10
28 U.S.C. 1295(a)(9) 4
42 U.S.C. (& Supp. III) 423 11
42 U.S.C. (Supp. III) 423(d)(5)(A) 9
Fed. Cir. R. 18(a) 4

Miscellaneous:

H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. (1984) 11
H.R. Rep. 98-618, 98th Cong., 2d Sess. (1984) 11
S. Rep. 98-466, 98th Cong., 2d Sess. (1984) 11

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A8-A9) and the opinion of the Merit Systems Protection Board (Pet. App. A1-A7) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1986, and the petition for a writ of certiorari was filed on January 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant portions of 5 U.S.C. 8337 and 8347 are reproduced at Pet. App. A10-A12.

STATEMENT

1. Petitioner was employed by the Social Security Administration as a GS-10 social insurance representative. On April 29, 1977, the United States Civil Service Commission granted petitioner's application for civil service disability retirement benefits because of his poor eyesight. Eight years later, while petitioner was gainfully employed as a Senior Claims Examiner for the State of Rhode Island, the Office of Personnel Management (OPM) notified him that his disability annuity would be terminated. This notice was based on OPM's conclusion that petitioner's medical condition had improved to the point where he no longer was disabled within the meaning of the Civil Service Retirement Act, 5 U.S.C. 8337 (d).[1] OPM denied petitioner's request for reconsideration on July 25, 1985. Pet. App. A2.

2. Petitioner then sought review by the Merit Systems Protection Board (MSPB). In a decision dated September 25, 1985, a MSPB presiding official affirmed OPM's decision, holding that petitioner had failed to sustain his burden of establishing that he remained disabled from providing useful and efficient service in his former position (Pet. App. A1-A5). Specifically, the presiding official found that

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[1] Pursuant to the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*, responsibility for determining eligibility for disability retirement benefits was transferred from the Civil Service Commission to OPM. See 5 U.S.C. 8347.

petitioner's eyesight had improved significantly since his retirement (*id.* at A3):

> The agency submitted a June 17, 1985 letter from Dr. Paul Sydlowski, M.D., a specialist in Ophthalmology. Dr. Sydlowski indicated that [petitioner] had been his patient for eight years. In 1977 [petitioner's] vision was 20/400 and 20/200. Cataract surgery was performed in 1977. [Petitioner] had four other operations on his eye resulting in a 20/25 range in his one good eye (the other remained 20/400). He indicated [petitioner] could not drive because he was legally blind. He noted [petitioner] could be gainfully employed without reliance on his loss of peripheral field.

The presiding official also reviewed the evidence concerning petitioner's leg problem and concluded (*id.* at A3-A4):

> Based upon the record before me, I find that [petitioner] has not shown he is disabled for useful and efficient service in the position of Social Insurance Representative. Dr. Sydlowski indicated [petitioner's] eye problem would not keep him from being gainfully employed. Additionally, [petitioner's] leg problem did not prevent him from successfully working at a sedentary job for several years for the State of Rhode Island. [Petitioner's] former position of Social Insurance Representative is a sedentary position much like the position he has been performing with Rhode Island. Although [petitioner] credibly testified about the differences in the two jobs, this evidence is insufficient without medical evidence showing he was unable to perform the duties of his former federal position. Therefore, I find he has not shown that his medical prob-

> lem would keep him from performing his duties of Social Insurance Representative.

The full MSPB denied petitioner's petition for review on January 7, 1986 (Pet. App. A6-A7).

3. In a brief unpublished opinion dated October 31, 1986, the court of appeals affirmed the MSPB's decision (Pet. App. A8-A9). The court of appeals noted that, under *Lindahl* v. *OPM*, 470 U.S. 768 (1985), judicial review of MSPB decisions in civil service disability retirement cases is limited to determining "whether 'there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error "going to the heart of the administrative determination."'" Pet. App. A9 (quoting 470 U.S. at 791 and *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), cert. denied, 393 U.S. 952 (1968)). In this case, the court concluded, "such an error has not been established" (Pet. App. A9).

ARGUMENT

The unpublished and nonprecedential decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals.[2] Nor does it present any issue of special importance warranting review by this Court. The Federal Circuit has exclusive jurisdiction to entertain appeals from MSPB decisions in civil service retirement cases. See 5 U.S.C. 7703(b)(1) and 28 U.S.C. 1295(a)(9). Accordingly, judicial review of

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[2] Rule 18(a) of the Federal Circuit's Rules provides that "[o]pinions designated as unpublished shall not be employed as precedent by this court, nor may they be cited by counsel as precedent, except in support of a claim of res judicata, collateral estoppel, or law of the case."

the procedures followed by the MSPB in its adjudication of such cases is a matter within the special competence of the Federal Circuit. This Court recently denied review of the Federal Circuit's decision sustaining the MSPB's general approach to the allocation of the burden of proof in civil service disability retirement cases. See *Lindahl* v. *OPM*, 776 F.2d 276 (1985), cert. denied, No. 85-6214 (May 12, 1986). There is no reason for a different disposition of petitioner's challenge to the particular application of that general approach in the context of an annuitant's continuing eligibility for benefits.

1. Petitioner contends (Pet. 5-18) that the MSPB acted arbitrarily and capriciously in following a rule of decision under which an annuitant bears the burden of establishing that he continues to be disabled. The adjudicatory approach that petitioner challenges, however, is fully supported by the text of the Civil Service Retirement Act and the opinions of this Court and the Federal Circuit in *Lindahl*. Moreover, that approach was followed by the MSPB's predecessor agency, the Civil Service Commission, and it was formally carried forward by the MSPB almost six years ago in *Prestien* v. *MSPB*, 8 M.S.P.R. 698 (1981). This established practice clearly is not arbitrary or capricious.

a. The MSPB's review of civil service disability retirement claims is governed by 5 U.S.C. 8347. Subsections (a) through (c) of Section 8347 provide for OPM to administer the retirement program, to prescribe regulations for that purpose, and to adjudicate claims. Subsection (d)(1) then provides that, "[s]ubject to paragraph (2) of this subsection," a decision by OPM on an application for retirement benefits "may be appealed to the Merit Systems Pro-

tection Board *under procedures prescribed by the Board*" (emphasis added). The emphasized phrase makes it clear that Congress did not impose rigid procedural rules upon the MSPB, but rather vested the Board with broad discretion to adopt such rules as it finds appropriate for the adjudication of civil service retirement cases. Accordingly, as the court of appeals correctly held in *Lindahl* v. *OPM*, 776 F.2d at 278-279, the MSPB was not barred by the Civil Service Retirement Act from allocating the burden of proof to the former employee in such cases.

This conclusion is confirmed by reference to paragraph (2) of Section 8347(d). That paragraph provides that the "procedures under section 7701" of Title 5 shall apply in a limited class of cases, namely, those in which the agency has filed an application for disability retirement of an employee based upon the employee's mental condition. One of the "procedures under section 7701" that is thereby incorporated is set forth in Section 7701(c)(1)(B), which permits the MSPB to sustain an agency's decision only if it is supported by a preponderance of the evidence; that provision has the effect of placing the burden of proof on the agency in hearings regarding adverse actions and similar cases governed by 5 U.S.C. 7701. Thus, when Congress enacted Section 8347(d)(2) in 1980, it determined that agency-initiated disability retirements based on an alleged mental impairment were sufficiently like adverse actions to warrant application of the same procedural protections that employees are afforded in adverse actions. See *Lindahl* v. *OPM*, 470 U.S. at 783-785. But Congress has refrained from imposing the burden of proof on the agency in any other civil service retirement cases. This omission strongly supports the reasonableness

of the MSPB's administrative decision not to impose the burden of proof on OPM in civil service disability retirement cases generally. Compare *United States* v. *Erika, Inc.*, 456 U.S. 201, 206-208 (1982).

b. In accordance with the text of the governing statutes, the Federal Circuit, on remand from this Court's decision in *Lindahl*, sustained the MSPB's practice of placing the burden of proof upon new applicants for retirement benefits. That policy in turn had been formally articulated by the Board in *Chavez* v. *OPM*, 6 M.S.P.R. 404 (1981). The Board there reasoned that (1) the governing statutes do not mandate any particular allocation of the burden of proof in retirement cases; (2) the longstanding administrative practice has been to place the burden upon the applicant to establish his eligibility for retirement benefits; (3) the burden of proof is properly placed upon the person seeking entitlement to a statutory benefit; and (4) it is reasonable to place the burden upon the applicant because he normally possesses or has ready access to the evidence relating to his medical condition. *Chavez*, 6 M.S.P.R. at 414-416. Moreover, as the court of appeals noted in *Lindahl*, if Congress had desired to alter the prior administrative practice and place the burden of proof upon OPM, Congress could easily have done so when it enacted the Civil Service Reform Act in 1978. See 776 F.2d at 279-280 (contrasting 5 U.S.C. 8347(d)(1) and (d)(2), discussed at page 6, *supra*). The fact that Congress declined to disturb the prior administrative practice lends additional support to the reasonableness of the MSPB's overall approach.

c. Consistent with its prior decision in *Lindahl*, the court of appeals in the instant case correctly

sustained the MSPB's conclusion that the burden of proof on the question of eligibility for disability retirement benefits should be allocated to the former employee, not only when he first applies for benefits, but also when his continuing eligibility is at issue. In following that approach in this case, the Board relied upon its earlier decision in *Prestien* v. *OPM*, 8 M.S.P.R. 698 (1981), where it reasonably determined that the rationale of *Chavez* also applies in the present context.

The MSPB noted in *Prestien* that the practice of the Civil Service Commission had been to require the annuitant to establish his continuing eligibility for benefits. 8 M.S.P.R. at 704.[3] In *Prestien*, as in *Chavez*, the MSPB found no indication that Congress intended to overturn that settled practice when it enacted the Civil Service Reform Act of 1978. See 8 M.S.P.R. at 704-705 & n.7. And in *Prestien*, as in *Chavez*, the Board reasonably concluded that it was fair to place the burden upon the annuitant because he has primary access to the evidence necessary to establish his continuing disability (8 M.S.P.R. at 704-705). Compare *United States* v. *New York, N.H. & H.R.R.*, 355 U.S. 253, 256 n.5 (1957).

d. The reasonableness of the MSPB's approach is further supported by administrative experience and

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[3] Petitioner asserts in passing (Pet. 13-14) that the Civil Service Commission in fact did not place the burden of proof on the annuitant to establish his continuing eligibility. However, petitioner offers no rebuttal to the MSPB's reading of the Commission's precedents. In any event, the assessment of the past practices of the responsible agency (and of its predecessor) is a matter properly committed to that agency's expertise, and petitioner has not shown that the MSPB's determination in *Prestien* was clearly erroneous.

congressional action under the Social Security disability program. This Court recognized in *Mathews* v. *Eldridge*, 424 U.S. 319, 336 (1976), that that program places the burden on the claimant "to establish initial and *continued* entitlement to disability benefits" (emphasis added). The claimant's burden of proof in this regard is prescribed by 42 U.S.C. (Supp. III) 423(d)(5)(A), which provides that "[a]n individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require."

Ignoring both *Mathews* v. *Eldridge* and Section 423(d)(5)(A), petitioner argues (Pet. 11-12) that the burden is on the Secretary of HHS to establish that the Social Security recipient has recovered from his disability. However, the cases cited by petitioner (*McAulay* v. *Heckler*, 749 F.2d 1500 (11th Cir. 1985); *Vaughn* v. *Heckler*, 727 F.2d 1040 (11th Cir. 1984); *Simpson* v. *Schweiker*, 691 F.2d 966 (11th Cir. 1982))—which have since been superseded (see pages 9-11, *infra*)—stood only for the proposition that under principles of administrative res judicata, the original finding of disability should control at a subsequent proceeding to review the claimant's continuing eligibility, in the absence of some evidence of medical improvement. Indeed, the court of appeals in *Simpson* specifically noted that the burden remained upon the annuitant to prove both initial and continuing eligibility for benefits (691 F.2d at 969).

Whatever the prior state of the law, however, the Social Security cases cited by petitioner do not take account of the amendments made by Section 2(a) of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 *et seq.* (codi-

fied at 42 U.S.C. (Supp. III) 423(f)).[4] Those amendments prescribe detailed standards for review of the continuing eligibility of persons currently receiving disability benefits. As relevant here, the amendments provide, subject to certain exceptions, that an individual's benefits may be terminated only if there is substantial evidence that his medical condition has improved and that he is now able to engage in substantial gainful activity. 42 U.S.C. (Supp. III) 423(f)(1).

Significantly, however, although several courts had held before passage of the 1984 Act that a prior finding of disability created a presumption of continuing disability and shifted the burden to the Secretary to prove that the individual's medical condition had improved, that approach was rejected by Congress in 1984. Instead, Congress provided in the final paragraph of 42 U.S.C. (Supp. III) 423(f) that a determination regarding continuing disability shall be made "without any initial inference as to the presence or absence of disability being drawn from the

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[4] Two of the three appellate cases cited by petitioner, *Vaughn* and *Simpson*, were decided before the 1984 Act was signed into law on October 9, 1984. The third case, *McAulay*, was decided on January 8, 1985, but the court of appeals did not discuss the 1984 Act. Indeed, it would appear that the court of appeals in *McAulay* erred in even reaching the merits of the benefits termination issue. Under Section 2(d)(2)(C) of the 1984 Act, 98 Stat. 1797, any case that was pending in court on September 19, 1984, that raised the medical improvement issue was to be governed by the new statutory medical improvement standards in the 1984 Act, and *McAulay* therefore should have been remanded to the Secretary for review in accordance with those standards. See *Heckler* v. *Kuehner*, 469 U.S. 977 (1984); *Heckler* v. *Lopez*, 469 U.S. 1082 (1984).

fact that the individual has previously been determined to be disabled." In addition, the Conference Report emphasizes that determinations under the new substantive standards prescribed by the 1984 Act are to be governed by the same burden-of-proof standards that already were established by 42 U.S.C. 423—"[t]hat is, the claimant's obligations to establish the existence of his disability with regard to the CDI [Continuing Disability Investigation] proceeding are the same as his obligations with regard to an initial determination." H.R. Conf. Rep. 98-1039, 98th Cong., 2d Sess. 26 (1984).[5] The 1984 Act therefore superseded prior appellate decisions to the extent that they shifted to the Secretary the burden of proof or production on the question of whether the claimant's disability had ceased. See, *e.g.*, *Warren* v. *Bowen*, 804 F.2d 1120, 1121 (9th Cir. 1986).

In sum, as the foregoing discussion makes clear, the MSPB's determination in *Prestien* that the annuitant should bear the burden of establishing his continuing entitlement to civil service disability benefits is strongly supported by Congress's considered judgment to the same effect as regards continuing eligibility for Social Security disability benefits.

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[5] See also H.R. Rep. 98-618, 98th Cong., 2d Sess. 9 (1984) ("[T]he Supreme Court, in *Mathews* v. *Eldridge*, agreed with the agency that the burden of proving continuing eligibility for benefits was on the beneficiary."); *id.* at 11 (because the standards for termination of benefits were not set forth in the Act prior to 1984, SSA "ha[d] wide discretion to apply whatever standards it deemed appropriate"); S. Rep. 98-466, 98th Cong., 2d Sess. 10 (1984) ("[T]he Committee considered carefully and rejected the proposal to shift the burden of proof in eligibility determinations from the claimant to the Government once the individual is on the benefit rolls.").

e. Against this background, the MSPB's allocation of the burden of proof in this case was, at the very least, not arbitrary and capricious or an abuse of discretion, as petitioner contends (Pet. 6, 8, 18). Nor does it furnish a basis for setting aside the Board's decision under the standard of review endorsed by this Court in *Lindahl*, 470 U.S. at 791. The Board's decision in this case to *follow* the procedural approach previously used by it and by the Civil Service Commission prior to 1978 plainly does not constitute a " 'substantial *departure* from important procedural rights' " (470 U.S. at 791). Similarly, the MSPB's allocation of the burden of proof under a statute that on its face commits that matter to the Board's discretion entails no " 'misconstruction of the governing legislation' " (*ibid.*). Nor, finally, is there any error "going to the heart of the administrative determination" (*ibid.*), because there is nothing fundamentally unfair about requiring a person who seeks to receive future statutory benefits to bear the burden of establishing his entitlement to do so, whether or not he has received such benefits in the past.

2. Petitioner also challenges (Pet. 19-25) the MSPB's factual determination that he is not "disabled" within the meaning of the Civil Service Retirement Act. However, judicial review of that determination is expressly barred by statute. Under 5 U.S.C. 8347(c), OPM has the responsibility to "determine questions of disability," and the decisions of OPM on these matters "are final and conclusive and are not subject to review." In *Lindahl*, the Court construed this language to bar judicial review of "OPM's *factual* determinations about 'questions of disability' " (470 U.S. at 779 (emphasis in original)). See also 470 U.S. at 791 ("the factual under-

pinnings of § 8347 disability determinations may not be judicially reviewed"); *id.* at 779 n.12, 780, 787 n.22.

Petitioner seeks to avoid this bar by asserting that there is *no* evidence in the record to support the MSPB's decision in this case and that judicial review should be available with respect to that question notwithstanding the language of 5 U.S.C. 8347(c) and *Lindahl*. There is no merit to this argument. A disability retirement claimant may not avoid the bar to judicial review of the "factual underpinnings" of the administrative decision (*Lindahl*, 470 U.S. at 791) merely by asserting that are no factual underpinnings to support that decision. The Federal Circuit therefore has correctly rejected this and similar efforts to avoid the statutory bar in 5 U.S.C. 8347(c) and this Court's decision in *Lindahl*. See *Smith* v. *OPM*, 784 F.2d 397 (Fed. Cir. 1986); *Lee* v. *OPM*, 762 F.2d 987 (Fed. Cir. 1985); *Smith* v. *OPM*, 760 F.2d 244 (Fed. Cir. 1985). We note as well that where, as here, the burden is on the person seeking statutory benefits, it is not logically necessary for the record to contain evidence affirmatively showing that the former employee is *not* disabled, because, in appropriate circumstances, benefits may be denied solely on the ground that the former employee has not proved that he *is* disabled.

In any event, there in fact was medical evidence in the record before the MSPB that documented a significant improvement in petitioner's eyesight. Between the time of petitioner's retirement and the time of the termination of his disability annuity, his eyesight in one eye improved from 20/200 to 20/25, and petitioner's own ophthalmologist concluded that petitioner could be gainfully employed notwithstand-

ing his loss of peripheral vision (Pet. App. A3). Indeed, petitioner in fact was gainfully employed by the State of Rhode Island. The court of appeals therefore had no occasion to address petitioner's contention that review should be available in the *absence* of any evidence that petitioner is not disabled, and it did not purport to do so (*id.* at A9). That question therefore is not properly presented for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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